82 - 1056

No. .....

IN THE

Supreme Court of the United States

October Term, 1982

MARSHALL FIELD & COMPANY,

Petitioner,

vs.

RAYMOND ALLEN, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SHEPPARD, MULLIN, RICHTER & HAMPTON,
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Questions Presented for Review.

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, incorporates the enforcement provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b). The questions presented for review are:

1. Does a United States District Court have the power to order the sending of notice to potential plaintiffs to solicit their consent to join in an ADEA action brought pursuant to the enforcement provisions of the FLSA notwithstanding the fact that: (i) those enforcement procedures do not authorize notice; and (ii) there is compelling legislative intent that there be no notice?

2. Assuming that a United States District Court is without power to compel the sending of notice, what relief is appropriate with respect to persons who joined the age discrimination action as a result of an improper court-ordered notice to potential plaintiffs?

Parties to Action.

The petitioner is Marshall Field & Company, defendant in the action in district court. The respondents include the original four named plaintiffs, Raymond Allen, Peter Bosman, Carol E. Bunn, and Karl C. Kaiser, and an additional 64 persons who filed consents to become plaintiffs as a result of a court-authorized notice. A complete listing of the names of all respondents is contained in the Appendix.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Opinions Below.

The unreported opinion of the Court of Appeals for the Seventh Circuit, rendered on September 22, 1982, is attached in the Appendix. The March 25, 1982 Minute Order of the District Court for the Northern District of Illinois, from which Petitioner Marshall Field & Company appealed to the Seventh Circuit, is also attached in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 22, 1982. This petition for a writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provision Involved.

The statutory provision involved in this petition is Section 16(b) of the Fair Labor Standards Act, which provides in relevant part that:

> "An action to recover [damages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves or other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

Statement of the Case.

On October 16, 1981, four plaintiffs (Allen, Bosman, Bunn, and Kaiser) brought this age discrimination action against Petitioner Marshall Field & Company (the "Company"), invoking the district court's jurisdiction under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq*. The Complaint was brought "on behalf of themselves and on behalf of others similarly situated," pursuant to Section 7(b) of the ADEA (29 U.S.C. § 626(b)) and Section 16(b) (29 U.S.C. § 216(b)) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq*.

On December 15, 1981, Respondents filed a Motion to Send Notice to Persons Who May Have Been Discriminated Against by Marshall Field Because of Their Age. The Company filed written opposition to this Motion.

On January 21, 1982, the district court:

(1) ordered the Company to provide Respondents with the names and addresses of all current and former executives of its Chicago Division who, since January

1, 1977, were discharged, demoted, transferred, or forced into early retirement;

(2) ordered that a notice be sent to such persons on or before February 5, 1982;

(3) determined that consents to join the action from such persons, which were mailed to the clerk of the court and postmarked on or before March 1, 1982, would be considered timely filed;

(4) approved the Respondents' proposed notice; and

(5) denied the Company's request to certify its order for appeal pursuant to 28 U.S.C. § 1292(b). (*See* Minute Orders dated January 21, 1982, and January 27, 1982).

The court prepared a Memorandum Opinion on the notice question, which was filed on January 27, 1982.

As ordered, the Company provided Respondents the names and addresses of 157 persons, and Respondents sent notice to these individuals on or about January 29, 1982. Thereafter, notices were mailed to an additional 63 persons.

Prior to the time the notice was sent, *not one individual had filed a written consent to join the named plaintiffs as a party plaintiff in this action.* After the notice was mailed to potential plaintiffs, however, consents were returned to the designated post office box by over 60 individuals.

On March 19, 1982, shortly before the last day on which the last-notified group of potential plaintiffs could join the action, the Company filed a Motion to Strike Consents and to Dismiss Those Persons Filing Consents From This Action ("Motion to Strike Consents and to Dismiss").[1]

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[1]The Company's Motion to Strike Consents and to Dismiss was supported by a detailed Memorandum of Points and Authorities on the issues of notice and solicitation, and by numerous affidavits attesting to a flagrant campaign of publicity and solicitation engaged in by the named plaintiffs in an effort to obtain consents from current and former employees. The Company's motion was made on the ground that each of the filed consents was invalid and ineffective since each was the tainted result of improper notice to, and solicitation of, potential plaintiffs. Concurrently, the Company filed a Motion for Certification for Appeal and a Stay of the present action ("Motion for Certification and a Stay").

The Company's Motion to Strike Consents and to Dismiss and its Motion for Certification and a Stay were denied by the district court on March 25, 1982. (*See* Minute Order dated March 25, 1982, Appendix). On April 22, 1982, the Company timely filed in the district court a Notice of Appeal from the Minute Order of March 25, 1982.[2]

The Court of Appeals for the Seventh Circuit took jurisdiction of the appeal pursuant to the collateral order doctrine as recognized in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). On September 22, 1982, the Court of Appeals affirmed the district court's order that notice can be sent.

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[2]On May 3, 1982, the Company filed a Petition for Writ of Mandamus with the Court of Appeals for the Seventh Circuit, requesting the Court to issue a writ directing the district court to strike the consents and to dismiss those filing consents. This Petition was accompanied by numerous Exhibits which were considered by the Seventh Circuit in deciding both the Appeal and the Petition. The Seventh Circuit denied the Petition for Writ of Mandamus on May 27, 1982.

REASONS FOR GRANTING THE WRIT.

Petitioner asks this Honorable Court to consider an important legal question about which the United States Court of Appeals for the Ninth Circuit and the Second and Seventh Circuits have reached opposite results, and upon which the United States Supreme Court has not ruled. The Ninth Circuit has twice held that a court does not have the power to authorize notice to potential claimants in an action brought under Section 16(b) of the FLSA. The Second and Seventh Circuits have ruled otherwise.

In addition, the significance of this important legal question clearly warrants consideration by this Honorable Court in light of the proliferation of age discrimination litigation in the United States District Courts.

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Power of a Court to Order Notice to Potential Claimants in an Action Brought Pursuant to the FLSA.

The Ninth Circuit in *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977) reversed the order of the district court which permitted the two named plaintiffs to send out a notice to potential plaintiffs in an action under Section 16(b) of the FLSA. The court's reversal was premised on the following reasons:

> (1) Section 16(b) does not provide for notice procedures;
>
> (2) In a FLSA "class action" under Section 16(b) the res judicata effect applies only to the named parties and to those persons who affirmatively "opt-in" to the action. The reason for notice under Rule 23 of the Federal Rules of Civil Procedure is to provide due process without which a judgment might not be binding on class members. Thus, due process considerations

which require notice in a class action under Rule 23 are *not* present in a Section 16(b) action which does not bind nonconsenting class members;

(3) Congress was well aware of the differences between the procedures under Rule 23 and those under Section 16(b) when it adopted the FLSA enforcement provisions for ADEA actions. The adoption of a Rule 23-type notice to facilitate the opting-in of potential class members is contrary to the congressional intent in rejecting Rule 23 procedures; and

(4) The court should avoid the involvement of either plaintiff or the court in stirring up litigation and the solicitation of claims. Even under Rule 23, the reason for notice is not to stir up claims but rather is to provide due process to class members.

The Ninth Circuit reaffirmed this holding in *Partlow v. Jewish Orphans' Home*, 645 F.2d 757 (9th Cir. 1981). Plaintiffs' counsel in *Partlow* had solicited potential plaintiffs to join the pending action and sixty-nine employees then filed "consents." The Ninth Circuit stated that:

> "*Kinney* makes clear that under the law of this circuit, named plaintiffs' counsel had no power to solicit the class members. *Id.* The district court quite properly found that the resulting 'consents' were ineffective." 645 F.2d at 759.

The Second Circuit, however, concluded that Section 16(b) permits notice "in an appropriate case." *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d 335 (2nd Cir. 1978). The Seventh Circuit chose to follow the *Braunstein* decision in *Woods v. New York Life Insurance Co.*, 686 F.2d 578 (7th Cir. 1982), and in the present action. It held in this action that the court has the "power to authorize notice by the plaintiff or his counsel to members of the class." (Appendix).

These decisions are contrary to the congressional intent, in Section 16(b) actions, to afford "a statutory class action 'independent of and unrelated to the class action covered by Rule 23.' . . ." *Kinney* at 862. Congress considered, but rejected, proposals to model the ADEA enforcement provisions after Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*), which permit class actions under Rule 23. *Lorillard v. Pons*, 434 U.S. 575, 578 (1978).[3] Congress intended to use the existing scheme of the FLSA which does not provide for notice. *Id.* at 578, 580.

In making the choice to incorporate into the ADEA the enforcement provisions of the FLSA, including the consent filing provision, it was the clear intent of Congress to adopt procedures that "afford more expeditious and individual treatment of claims of age discrimination than those afforded by either the National Labor Relations Act or Title VII." *Naton v. Bank of California*, 72 F.R.D. 550, 555 (N.D. Cal. 1976). Adoption of a Rule 23-type notice would be contrary to the congressional intent to reject Rule 23 procedures.

This congressional intent was reinforced when Congress amended the ADEA in 1978 (The Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256, 92 Stats. 189). At the time of the amendments, *Kinney*, but not *Braunstein*, had been decided. Congress did not add any authority for notice nor did it indicate its disagreement with the *Kinney* decision prohibiting notice, even though it explicitly disagreed with judicial decisions interpreting

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[3]Senator Javits, the chief proponent of the adoption of the FLSA enforcement procedures, stated that the more restrictive requirements of Section 16(b) were "best adapted to carry out [the] age-discrimination-in-employment ban *with the least overanxiety or difficulty on the part of American business*. . . . [T]his is one of the most important aspects of the bill." 113 Cong. Rec. 31254 (1967) (*emphasis added*).

other procedural provisions of the ADEA. *See* S. Rep. No. 95-493, 95th Cong., 2d Sess. 12-13 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News, Vol. 3, 515-516. As noted in *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979) and in *Lorillard, supra* at 581-82, Congress is presumed to have been aware of the judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without changes. Congress thus approved of the *Kinney* decision prohibiting notice.

The history of Section 16(b) also demonstrates the congressional intent to limit the number of plaintiffs and the size of actions brought pursuant to Section 16(b). The consent filing provision was added in 1947 in response to the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Anderson*, the Court held that employees were entitled to be paid for the time spent in in-plant activities both before and after the actual performance of their work. The recognition by both government and private industry of the potentially huge liability that could have arisen from broad-based *Anderson* actions under the FLSA resulted in the enactment of the consent filing provision, and the simultaneous elimination of Section 16(b)'s provision allowing "agent or representative" actions. *See LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 287 n. 6 (5th Cir. 1975).

Courts which have approved of notice in Section 16(b) actions have argued that notice will avoid a multiplicity of actions. This argument is incorrect. First, Congress rejected broad-based actions enlarged by notice; rather, it sought "more expeditious and individual treatment" of age discrimination claims. *Naton, supra* at 550. Second, as noted in *Baker v. The Michie Co.*, 25 WH Cases 368 (W.D.Va. 1982), it may well be in the best interests of notified, potential plaintiffs not to join the pending action, but "rather

to allow other plaintiffs to bear the burden of the initial litigation and then to file suit if the prospects of success appear favorable," 25 WH Cases at 371. Thus, notice cannot be justified on this ground.

If courts authorize or permit notice in ADEA actions, they disrupt the delicate balancing of interests that was struck by Congress when it adopted Section 16(b) of the FLSA as part of the ADEA enforcement scheme. Such action usurps the legislative prerogative and results in broad-based ADEA actions neither contemplated by Congress, nor bounded by the procedural safeguards of Rule 23.[4]

2. This Unsettled Issue of the Power of a Court to Order Notice to Potential Claimants Has Significant Impact on the Many Pending ADEA Actions.

The number of cases brought under the ADEA has increased dramatically in the last few years. Lawsuits are currently pending against major employers such as Consolidated Edison, Equitable Life, Federated Department Stores, Dayton Hudson, Chrysler, TWA, NBC, Northern States Power, Rockwell International, and General Motors. (*Dun's Business Month*, "Big Surge in Age Bias Suits", September 1982, page 56). In 1980, EEOC chief Eleanor Holmes Norton predicted that the EEOC will see "extraordinary growth" in age discrimination cases over the next few years. (*U.S. News and World Report*, "Trends in

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[4]Rule 23's requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the Rule's practices and provisions relating to certification, decertification, maintainability, notice, and settlement, all serve to ensure that broad-based Title VII class actions are litigated in a fair and efficient manner. Section 16(b), however, is wholly devoid of any such provisions or practices. This is because, both at the time the ADEA was enacted, and today, Rule 23-type provisions and practices are wholly unnecessary and inappropriate in Section 16(b) cases, given the limited nature of the actions that Congress contemplated would be maintained pursuant to that provision.

Labor", July 7, 1980, page 72). The EEOC reported that 13,164 charges of age discrimination were filed during fiscal year 1981. (EEOC, *Annual Report for Fiscal Year 1981*, Appendix 1, p. 2). In fiscal year 1976, the Department of Labor, which previously administered the ADEA, investigated approximately 6,630 charges. (U.S. Dept. of Labor, Emp. Stds. Adm., *Age Discrimination in Employment Act of 1976: A Report Covering Activities Under the Act During 1976*, p. 9).

Permitting notice to potential claimants in these age actions may increase the complexity and decrease the manageability of each action. Unlike the Rule 23 requirement that class members must have common claims, Section 16(b) requires that opt-in plaintiffs be "similarly situated."[5] Where the only similarity among the plaintiffs is the general claim of age discrimination, the action may include plaintiffs who allege disparate treatment because of age due to demotion, transfer, discharge or forced early retirement at various locations by different executives. The heart of such a case focuses on each individual's performance in individual situations. No employer practice applicable to each plaintiff is involved, as would be required in a Rule 23 proceeding.

The instant case illustrates the complexity and unmanageability that results from the joinder of plaintiffs as a result of the notice such as that given here. Far from having common claims, plaintiffs' purported claims arose in widely-scattered locations, while plaintiffs held positions at widely-varying corporate levels. Some plaintiffs remain

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[5]The procedure of Section 16(b) was originally adopted for cases involving claims of minimum wage and overtime violations. The factual and legal questions usually involved pay practices that were equally applicable to each plaintiff.

employed by defendant, while others were terminated, voluntarily chose to leave defendant, or allege that they were "forced" to take early retirement. Serious conflicts of interest also exist between some plaintiffs. (*E.g.*, consenting plaintiff Shaw was the immediate supervisor of, and one of the individuals who participated in the decision to terminate, named plaintiffs Allen and Bosman.) Thus, notice has resulted in a situation where the jury or juries will literally have to decide over 60 factually unique cases.[6] This procedure is contrary to the congressional intent to have a "more expeditious and individual treatment" of age discrimination claims than Title VII claims. *Naton v. Bank of California, supra* at 555.

Conclusion.

The many pending ADEA actions will be greatly affected by the resolution of this issue of notice. Until this Court rules on this issue, some district courts will permit notice to potential claimants, thereby encouraging the joinder of divergent age claims which depend upon the particular facts of each individual's claims. District courts will be forced to devise elaborate procedures in order to try such individual claims all in one action. This result is contrary to the congressional intent in rejecting notice and does not comport with judicial efficiency.

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[6]The district court on September 30, 1982 authorized additional notices to potential plaintiffs. As a result of the latest notice, 13 new plaintiffs have filed consents in October 1982 to join the action set for trial on February 28, 1983.

A writ of certiorari should issue to review the judgment of the Seventh Circuit.

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER
& HAMPTON,
DAVID A. MADDUX,
DAVID S. BRADSHAW,
R. CRAIG SCOTT,
By DAVID A. MADDUX,
Attorneys for Petitioner,
Marshall Field & Company.

APPENDIX.

Judgment of the Court of Appeals.

United States Court of Appeals, For the Seventh Circuit, Chicago, Illinois 60604.

September 22, 1982.

Before: Hon. *WILBUR F. PELL, JR., Circuit Judge, Hon. JESSE ESCHBACH, Circuit Judge.* Hon. *RICHARD A. POSNER, Circuit Judge.*

Raymond Allen, etc. et al., Plaintiffs-Appellees, vs. Marshall Field & Company, Defendant-Appellant. No. 82-1667.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 81 C 5811. Judge Hubert L. Will.

The Court has considered the following documents:

1. The "MOTION TO DISMISS APPEAL" filed on June 3, 1982, by counsel for the plaintiffs-appellees.
2. The "APPELLANT'S STATEMENT AND SUPPORTING MEMORANDUM RE JURISDICTION" filed on June 7, 1982.
3. The "APPELLEES' MEMORANDUM IN RESPONSE TO APPELLANTS' MEMORANDUM ON JURISDICTION" filed on June 8, 1982.

We DENY appellees' Motion to Dismiss and accept jurisdiction over this appeal pursuant to the collateral order doctrine in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

On January 21, 1982, the district court authorized notice of the pending action, and consent forms by which to join the action, to be sent to prospective plaintiffs. Defendant-appellant, Marshall Field & Company, has filed a notice of appeal from the order of the district court denying its

motion to strike consents and to dismiss those persons filing consents from this action brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. Appellant is also appealing the denial of its motion for certification of the appeal and its motion for a stay of the proceedings before the district court.

Questions of certification and stay were addressed in the petition for writ of mandamus filed by appellant in Appeal No. 82-1708. The Petition for Writ of Mandamus was denied by this Court on May 27, 1982.

In a recently decided appeal this Court addressed the issue of whether a district judge has the power to notify prospective plaintiffs that an Age Discrimination in Employment action has been brought; and if so, how he should exercise that power. *Woods v. New York Life Insurance Co.*, No. 82-1827 (7th Cir. August 16, 1982). In *Woods* this Court affirmed the district court's power to authorize notice by the plaintiff or his counsel to members of the class; however, the court also held that suitable notice should not appear under a judicial letterhead and should not be signed by a judicial officer.

It appears that the notice and consent forms authorized by the district court to be sent in this case are not in compliance with this Court's holding in *Woods*. For this reason, although we ***affirm*** that part of the district court's order authorizing that notice be sent, we *reverse* the order insofar as it prescribes an incorrect form of notice, and *remand* to the district court to fashion appropriate relief.*

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*Compare *Partlow v. Jewish Orphans' Home of Southern Cal.*, 645 F.2d 757 (9th Cir. 1981), a suit brought under the Fair Labor Standards Act. In that case the district court order tolled the statute of limitations for filing suit under the FLSA for 45 days to allow potential plaintiffs, whose previously filed consents were ineffective, to file proper consent with the court.

Minute Order of District Court.

United States District Court, Northern District of Illinois, Eastern Division.

Name of Presiding Judge, Honorable HUBERT L. WILL.

Cause No.: 81 C 5811.

Title of Cause: Allen v. Marshall Field & Co.

Date: March 25, 1982.

Brief Statement of Motion: SH.

Status hearing held. MEMORANDUM OPINION to be filed within a short date regarding the court's ruling on pending motions. Defendant is given to and including April 14, 1982 to file its answer to the complaint. On defendant's motion, enter STIPULATION AND ORDER RE DISCOVERY. DRAFT. (DRAFT CONTAINED IN STIPULATION.) Enter STIPULATION AND ORDER PERTAINING TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS. DRAFT. (DRAFT CONTAINED IN STIPULATION.) Draft order to be submitted within a short date regarding plaintiffs' motion to approve additional mailing to opt-in plaintiffs who have not retained an attorney. Defendant's motion to require persons who have opted-in to designate their attorney of record is mooted. Defendant's motion to strike consents and to dismiss those persons filing consents from this action is denied. Defendant's motion for certification for appeal and a stay of the present action of any order denying defendant's motion to strike consents and to dismiss those persons filing consents from this action is denied. Revised order to be submitted within a short date regarding defendant's motion to permit defendant to interview its employees, CONNOR SHAW, and AUREL CAPRINI. Status hearing is continued to May 20, 1982.

List of Respondents.

ORIGINAL NAMED PLAINTIFFS:

Allen, Raymond
Bosman, Peter
Bunn, Carol E.
Kaiser, Karl C.

PLAINTIFFS WHO FILED CONSENTS TO JOIN ACTION BEFORE APPEAL, AND WHO ARE STILL IN ACTION

Atwell, Ned
Bartell, Findley
Bojar, Clement
Bone, William
Bonifield, Wayne
Bose, Theodore
Bradford, Ralph
Buckley, Robert
Caprini, Aurel
Carlson, Donald
Cartwright, Glenn
Chamberlain-Swenson, Marie
Colborne, Robert
Cuttie, Nola
Eckersley, Virginia
Eis, Edith
Emerson, Gene
Emerson, Mary Lou
Feary, Leo
Flesner, Eugene
Francis, Glen
Gianopulos, Bess
Green, Betty
Hackbert, Mary

Hermann, Ann
Jackson, Lillian
Kandl, Marie
Kirk, William
Knox, Robert
Krueger, Margery
Kuhn, Grace
Lantz, Annetta
Leeney, James
Lyon, Donlyn
Mack, Terry
Malsack, Richard
Marquetty, Gerard
Marsch, Harold
Mason, Shirley
Maxfield, Kenneth
Moffat, James
Moran, Harry
Newbould, Betty
Romann, Ruth
Sanders, Jack
Scupham, Patricia
Shaw, Connor
Shields, Vincent
Slayden, James
Smilanik, Mary Jane
Snedden, Donna
Stevens, Robert
Sykes, Andrew
Trempe, Helen
Urbain, Genevieve

PLAINTIFFS WHO FILED CONSENTS TO JOIN ACTION, BUT WHO HAVE BEEN DISMISSED

Cheslak, Mary
Darmicke, Marilyn
DeBouver, Ronald V.

Johnson, Ramona
Marasa, Victor
McKinsey, Phyllis
Murello, Ralph
Savage, Norbert
Warner, Rodney

PLAINTIFFS WHO FILED CONSENTS TO JOIN ACTION PURSUANT TO COURT AUTHORIZED NOTICE AFTER APPEAL

Baschnonga, Stephen A.
Boldt, Heinrich
Catanzaro, Donald R.
Clabough, Carl W.
Crowley, Thomas
Dutton, Richard R.
Hansen, James R.
Houston, Robert
Kandl, Marie H.
Serpico, Felix
Siegel, Sheldon A.
Spiegelhoff, Karl A.
Zuncic, Frank

No. 82-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARSHALL FIELD & COMPANY,
Petitioner,

vs.

RAYMOND ALLEN, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The issue raised by petitioner Marshall Field & Company is whether respondents can be barred from exercising their statutory right to join a class action lawsuit under the Age Discrimination in Employment Act ("ADEA") on the ground that the named plaintiffs sent them a neutral, truthful, court-approved notice describing the litigation. Asserting that the Court of Appeals erred in allowing the plaintiffs to send this notice, petitioner wants every class member who later opted into the suit dismissed with prejudice.

Not a court in the country has hinted that petitioner's position has merit. The case on which petitioner relies rejects its position, and for good reason: it is unconstitutional. There is no basis for certiorari.

RESPONDENTS' STATEMENT OF THE CASE[1]

In October 1981, four named plaintiffs filed this class lawsuit under the Age Discrimination in Employment Act ("ADEA"). They alleged a campaign by petitioner to rid itself of older managerial employees. Under Section 16(b) of the Fair Labor Standards Act, 29 U. S. C. § 216(b), which governs ADEA cases, class members cannot participate in the suit unless they file written consents to do so.[2] Plaintiffs therefore took steps to notify class members of the existence of the suit, so that they could decide whether to exercise this statutory right.

On January 28, 1982, the district court granted plaintiffs' motion to send notice to class members. The notice (Respondents' Appendix, pp. 1a-3a) described the allegations of the lawsuit, set forth petitioner's denial of wrongdoing, and disclaimed any opinion by the court about the merits of the case or whether recipients should join it. The notice advised recipients

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[1] The list of respondents is contained in petitioner's appendix pp. 4-6. This brief is submitted on behalf of all respondents on that list except Caprini, Shaw, Chamberlain-Swenson, Marquetty, Cheslak, Darmicke, DeBouver, Johnson, Marasa, McKinsey, Murello, Savage, Warner, Baschnonga, and Catanzaro.

[2] § 16(b) of the FLSA (29 U. S. C. § 216(b)) provides, in relevant part:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer in any Federal or State court of competent jurisdiction *by one or more employees for and on behalf of himself or themselves and other employees similarly situated. No employee shall become a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.* (Emphasis added.)

The Age Discrimination in Employment Act incorporates the procedures of FLSA § 16(b). See 29 U. S. C. § 626(b).

of what to do if they wished to exercise their statutory right to file their written consents to join. No one claims that this notice was anything other than a neutral, truthful description of the suit and of recipients' statutory right to join it.

After the notice was sent, some 60 persons, respondents here, filed consents to join the suit as co-plaintiffs. Petitioner then began efforts—of which this petition for certiorari is the latest—to have respondents dismissed with prejudice from the lawsuit on the ground that the district court had erred in allowing the notice to be sent to them.

These efforts began with a motion to dismiss respondents. When the district court denied this motion, petitioner filed a petition for writ of mandamus and a direct appeal. The Court of Appeals denied the petition for writ of mandamus on May 27, 1982. However, on August 16, 1982, before it had disposed of petitioner's direct appeal, the Court of Appeals decided *Woods* v. *New York Life Insurance Co.*, 686 F. 2d 578 (7th Cir. 1982). In *Woods*, the Court of Appeals held that nothing in the ADEA prohibits the named plaintiffs in a representative suit from notifying class members of the existence of the suit. The Court of Appeals also held that the district court had the power to supervise the contents of such a notice and that the notice should not be sent under the signature of the Clerk of the Court or other judicial officer.

On September 22, 1982, the Court of Appeals took jurisdiction over petitioner's appeal under the "collateral order doctrine," and disposed of it consistently with its holding in *Woods*. The unpublished order (Respondents' Appendix 4a-6a) affirmed the district court insofar as it authorized notice to be sent to class members, but reversed the district court insofar as the notice had gone out under the clerk of the court's signature rather than the named plaintiffs'. It remanded the case to the district court to fashion appropriate relief.

On remand, the district court took steps to purge any effects that might have been caused by having the clerk's signature on the notice. On September 30, 1982, it ordered

plaintiffs to send, over their signatures, a new notice and consent form to class members (Respondents' Appendix 6a-10a). The notices were accompanied by a letter from the plaintiffs (Respondents' Appendix 10a-11a) which explained that the previous notice had not been intended to express any view on the merits of the suit or to solicit anyone to join. All recipients who had joined the suit were required to file a reaffirmation form (Respondents' Appendix 10a) if they wished to continue their participation, and were expressly advised of their right to withdraw.

After receiving this notice and letter, all the original consenting plaintiffs expressly reaffirmed their desire to join the suit, as did thirteen additional persons. On December 21, 1982, after the process of renotification and refiling was completed, petitioner filed this petition for certiorari.

CERTIORARI SHOULD NOT BE GRANTED

To reverse the Court of Appeals, this Court would have to deliver two extraordinary holdings:

(1) that the ADEA affirmatively forbids the named plaintiffs from sending class members a neutral, truthful notice about the existence of the suit and their statutory right to join it; and

(2) that class members who receive such a notice must be punished by being forbidden to exercise their statutory right to join the suit.

There is nothing to be said for granting certiorari on either of these unconstitutional propositions.

A.

Neither the ADEA Nor the Constitution Supports a Rule Forbidding Named Plaintiffs From Sending Class Members a Truthful, Nonsolicitory Notice About the Existence of a Class Suit

The Court of Appeals, following its earlier decision in *Woods* v. *New York Life Insurance Co.*, 686 F. 2d 578 (7th Cir. 1982), held that nothing in the ADEA prevents the named

plaintiffs from sending a truthful notice to class members about the existence of a representative suit. Under *Woods*, the notice is to be signed by the plaintiffs, not by any judicial officer, and the district court may place appropriate restrictions on the notice to avoid misleading recipients. On remand from the Court of Appeals' decision, respondents were sent a new notice by the named plaintiffs in precise conformity with the *Woods* procedure. It is this *second* notice, sent by the named plaintiffs and not the court, whose validity is at issue on this petition.[3]

Petitioner asserts that *Woods* is wrong, and that the ADEA flatly forbids the named plaintiffs from sending a neutral, truthful, nonsolicitory notice about the existence of the lawsuit. This position is without merit. The ADEA contains no such restraint. If it did, it would be unconstitutional.

1. *Nothing in the ADEA Forbids Plaintiffs to Notify Class Members.* The ADEA contains no provision mentioning notice, much less a prohibition against named plaintiffs communicating with class members about the existence of a suit brought on their behalf. And there is no reference in the legislative history of the ADEA to the question of notice, much less an indication of Congressional intent to forbid plaintiffs to communicate with

[3] This fact—that it is the second, not the first, notice that is at issue—requires emphasis, because the petition for certiorari never mentions the second notice. Moreover, the petition never mentions (1) that the Court of Appeals *reversed* the district court's authorization of a notice signed by the clerk; (2) that it remanded the case for appropriate relief; (3) that the district court on remand conducted the consent procedure all over again; (4) that this time, a notice signed by the named plaintiffs was sent; and (5) that all the recipients opted in again after receiving the second notice. By suppressing these facts, the petition leaves the impression that the issue is the validity of the *original* notice. In fact, the Court of Appeals found that notice inappropriate, and the consent process was reconducted using a second notice that complied with the Court of Appeal's decision. The issue on this petition, therefore, is whether this *second* notice procedure complies with the ADEA.

class members about the suit. As Judge Posner wrote for the Court of Appeals in *Woods*, it would be anomalous for the ADEA to forbid such notice. The ADEA expressly "authorizes a representative action, and this authorization surely must carry with it a right in the representative plaintiff to notify the people he would like to represent that he brought a suit." *Woods*, 686 F. 2d at 580. Congress could not have intended to authorize representative actions but to keep class members in the dark about them.

To infer such Congressional intent to keep class members in the dark, petitioner cites the Congressional decision to avoid Rule 23 "opt-out" class actions under the ADEA. This proves nothing. That class members must affirmatively opt into an ADEA suit in no way implies that they cannot be notified of the suit. Instead, it implies the reverse. Since class members must act affirmatively to assert their rights, it is important that they get notice so that they may decide whether to act.

2. *Petitioner's Position Would Be Unconstitutional.* If the ADEA did forbid named plaintiffs from sending class members a truthful, nonsolicitory notice of the existence of their suit, such a prohibition would be a prior restraint on speech in violation of the First Amendment. Such prior restraints are presumptively unconstitutional, and only extraordinary governmental interests can justify them. *Southeastern Promotions* v. *Conrad*, 420 U. S. 546, 558-559 (1975). In the present case, there is no governmental justification, compelling or otherwise, for such a restraint, because everyone admits that the notice in question here was a neutral and truthful description of this lawsuit. Nor can petitioner raise the spectre of abuse in other cases. The Court of Appeals has expressly affirmed the right of the district court to supervise the contents of the plaintiffs' notice, to assure that class members are not misled.

3. *After Gulf Oil* v. *Bernard, the Kinney Decision Is Obsolete.* Petitioner seeks certiorari mainly on the fact that one early circuit court decision held that plaintiffs in a Fair Labor Standards Act class action could not send out a notice to class

members. *Kinney Shoe Corp.* v. *Vorhees,* 564 F.2d 859 (9th Cir. 1977). Since other circuits and almost all recent district court decisions have declined to follow *Kinney,* petitioner claims there is a "conflict" that demands this Court's attention. *Kinney's* rationale, however, was buried by this Court in *Gulf Oil* v. *Bernard,* 452 U.S. 89 (1981).

Kinney did *not* hold that the FLSA affirmatively *forbids* notice. Instead, it took the position that a named plaintiff could not communicate with class members about the suit unless some specific statute or rule affirmatively authorized him to do so. 564 F. 2d at 863-864. This position—that a representative plaintiff needs a specific authorization to speak about a class lawsuit to class members—was thoroughly discredited by *Gulf Oil* v. *Bernard,* which made it clear that such analysis gets matters backwards. Under *Gulf Oil,* which was decided under the shadow of the First Amendment, parties are presumptively free to communicate with others about a lawsuit unless defendant carries its burden of proving a specific, identifiable danger to the administration of justice that would result from that communication. 101 S.Ct. at 2200-2201.

Thus, after *Gulf Oil,* plaintiffs do not need, as *Kinney* had held, specific statutory authorization to speak to class members; instead, defendants need a specific authorization to *stop* them from speaking. Not even *Kinney* suggests that the FLSA (or the ADEA) contains a prohibition against named plaintiffs' notifying class members. And there is no possible abuse created by a neutral, truthful statement to class members about a lawsuit.

Not surprisingly, no other circuit has followed the early decision in *Kinney,* and after *Gulf Oil* there is scarcely a district

court to be found that follows it either.[4] There is no need to grant certiorari to reverse an isolated case whose rationale is now dead and buried.

4. *This Is the Wrong Case to Consider the Notice Issue.* Even if the notice issue were worth considering after *Gulf Oil*, this is not the case to consider it, because resolving the validity of the notice can have no practical effect on this lawsuit. The issue in this case is not whether notice should or should not go out, because the notice approved by the Court of Appeals has already been sent. Instead, the only issue is what to do with class members who opted in after the notice was sent. And, as shown in the next section, even if the notice was improper, the opt-ins cannot be dismissed from the suit. So the validity of the notice in this suit has become an academic exercise. Such exercises are never appropriate for certiorari.[5]

B.

Even if the Court of Appeals Had Erred in Allowing Notice to be Sent, Respondents Cannot be Forbidden to Exercise Their Right to Join the Suit

The relief petitioner seeks is to throw sixty innocent people out of this suit who have stated in writing—twice—that they want to exercise their statutory right to join it. Even if the Court

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[4] *Braunstein* v. *Eastern Photographic Laboratories*, 600 F. 2d 335 (2d Cir. 1978); *Monroe* v. *United Airlines, Inc.*, 90 F. R. D. 638 (N. D. Ill. 1981); *Riojas* v. *Seal Produce, Inc.*, 82 F. R. D. 613 (S. D. Tex. 1979); *Geller* v. *Markham*, 19 FEP Cases 1619 (D. Conn. 1979); *Lantz* v. *B-1202 Corp.*, 429 F. Supp. 421 (E. D. Mich. 1977); *Frank* v. *Capital Cities Communications*, 88 F. R. D. 674 (S. D. N. Y. 1981); *Cantu* v. *Owatonna Canning Co.*, unreported, No. 3-76-374 (D. Minn. 1978); *Johnson* v. *American Airlines*, 531 F. Supp. 957 (N. D. Tex. 1982).

[5] Moreover, the Court of Appeals' decision is an unpublished order that cannot even be cited within the Seventh Circuit as precedent. See Rule 35(d) of the Rules of the Seventh Circuit. The decision has no impact beyond this case—another reason for denying certiorari. Supreme Court Rule 17.

of Appeals had erred in holding that the named plaintiffs could send their notice to class members, this relief would be out of the question. No court has hinted that such a position has merit.

There is no qualification on the statutory right given by 29 U. S. C. § 216(b) to consent to join an ADEA class action. Nothing in the statute allows this right to be wiped out by a court because of the manner in which such persons learned about the suit. Nor has any case purported thus to lock the courthouse door to persons for whom Congress has opened it. To the contrary, the principal case on which petitioner relies in seeking certiorari, *Partlow* v. *Jewish Orphan's Home*, 645 F. 2d 757 (9th Cir. 1981), held that such relief would be unconstitutional.

Partlow was a case brought under the Fair Labor Standards Act. The attorney for the plaintiffs personally solicited opt-ins without court approval. In that context, the trial court held that these opt-ins were improperly secured, but it directed that a notice be sent to all persons who had filed consents, telling them they could refile. The defendants appealed from this order permitting a second notice. On appeal, the Ninth Circuit held that the sending of notice to the class, telling the opt-ins that they could refile consents, was not only permissible but *required* by due process considerations. 645 F. 2d at 759. The court stated flatly: "The consenting plaintiffs cannot be excluded from this lawsuit." 645 F. 2d at 760.

Partlow is thus the worst possible authority for petitioners. It holds that even if the consenting opt-ins joined the suit as a result of an improperly issued notice, they *cannot be dismissed from the suit.* And it approves exactly the procedure used here on remand from the Court of Appeals decision: renotification of the class and a new opportunity to opt in. No other holding was conceivable. To dismiss consenting class members would rewrite the statute, which says unconditionally that they may join, and it would violate due process. The parties who

consented have a statutory right to join. That statutory right is a property right protected by the due process clause. It cannot be taken away from them because of a court's error in how they were notified of the suit. *Logan* v. *Zimmerman Brush Company*, ____ U. S. ____, 102 S. Ct. 1148 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES BARNHILL
GEORGE F. GALLAND, JR.
DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, IL 60610
(312) 751-1170
Attorneys for Respondents
Raymond Allen, et al.

1. Original Notice and Consent Form Sent by District Court to Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAYMOND ALLEN, PETER BOSMAN, KARL C. KAISER, on behalf of themselves and on behalf of others similarly situated, *Plaintiffs,* v. MARSHALL FIELD & COMPANY, *Defendant.*	No. 81 C 5811

NOTICE OF PENDENCY OF AGE DISCRIMINATION LAWSUIT

TO: All persons who were employed by Marshall Field & Company at any time on or after January 1, 1977 and who are at present over 40 years of age.

RE: Age Discrimination In Employment Act (ADEA) lawsuit against Marshall Field & Company.

The purpose of this Notice is to advise you of an age discrimination lawsuit that his been filed against Marshall Field & Company and to advise you of the legal rights you have in connection with that suit.

1. *Description Of The Litigation.* Three former employees of Marshall Field & Company filed this lawsuit on October 10, 1981. The complaint alleges, in substance, that Marshall Field has engaged in a systematic course of discriminatory conduct against its older employees. This campaign is alleged to have begun in 1977 after Angelo Arena became president of Mar-

shall Field. Plaintiffs allege that this alleged campaign included termination or demotion of older employees for fictitious reasons and forced retirement of substantial numbers of other older employees by placing or threatening to place them in lower-paying or dead-end jobs. Marshall Field & Company has publicly denied all these charges and has denied that it discriminates against anyone on the basis of age.

2. *Your Right To Join This Suit As A Party Plaintiff.* If you believe that Marshall Field has discriminated against you on the basis of age in the manner plaintiffs assert in the complaint, you have the right to assert this claim against Marshall Field as a party plaintiff in the present lawsuit. To do that you must file with the Clerk of the Court a written Notice of Consent to be made a party plaintiff.

It is entirely your own decision whether or not to join this suit. You are not required to join in this case by filing your consent or to take any action unless you want to. It is completely voluntary.

3. *Your Options As to Legal Representation If You Join The Suit.* If you wish to join the suit as a party plaintiff, it is entirely your own decision as to whether you prefer to be represented by the present plaintiffs' attorneys or by an attorney of your own choosing. The attorneys for the present plaintiffs are:

Charles Barnhill, Jr.
George F. Galland, Jr.
Davis, Miner, Barnhill & Galland, Chtd.
14 West Erie Street
Chicago, Illinois 60610
(312) 751-1170

If you have any questions with respect to the case, you may contact them.

4. *How To File The Notice Of Consent If You Choose To Join This Suit.* Attached to this Notice is a form to be used if you wish to be a party plaintiff in this suit. That form must be

filled out, signed, and mailed to the Clerk of the Court *postmarked on or before* March 1, 1982. The form should be mailed to the following address:

Clerk of the United States
District Court
P.O. Box 10793
Chicago, Illinois 60610

Unless the Clerk receives a Notice of Consent form postmarked on or before March 1, 1982, you may not be allowed to join in this case.

5. *The Legal Effect Of Joining Or Not Joining In This Case.* If you do not file a consent form and join in this case, you will not receive any damages or other relief if the plaintiffs prevail here. Any such relief would be obtainable by you only if you began timely independent legal proceedings as prescribed by the Age Discrimination In Employment Act.

If, however, you decide to join the case by filing your consent, you will be bound by the judgment of the Court on all issues in the case.

6. *No Opinion Expressed As To The Merits Of The Case.* This notice is for the sole purpose of determining the identity of those persons who wish to be involved in this case. Although the Court has authorized the sending of this notice, there is no assurance at this time that the Court will find any plaintiff's contention meritorious or grant any relief.

7. *Protection Against Retaliation.* The Age Discrimination In Employment Act prohibits anyone from discriminating or retaliating against you if you choose to take part in this case.

/s/ H. Stuart Cunningham
H. Stuart Cunningham
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAYMOND ALLEN, PETER BOSMAN, KARL C. KAISER, on behalf of themselves and on behalf of others similarly situated, *Plaintiffs,*	No. 81 C 5811
vs.	
MARSHALL FIELD & COMPANY, *Defendant.*	Judge Hubert Will

NOTICE OF CONSENT TO JOIN AS A PARTY PLAINTIFF

I hereby give my consent to be a party plaintiff in this case.

Name _____

Address _____

_____

Telephone Number _____
(Area code) (Number)

Date of Birth _____

Signature _____

Date _____

2. Unpublished Order of the Court of Appeals Reversing and Remanding District Court's Approval of Original Notice

United States Court of Appeals, For the Seventh Circuit, Chicago, Illinois 60604.

September 22, 1982.

Before: Hon. *WILBUR F. PELL, JR., Circuit Judge, Hon. JESSE ESCHBACH, Circuit Judge,* Hon. *RICHARD A. POSNER, Circuit Judge.*

Raymond Allen, etc. et al., Plaintiffs-Appellees, vs. Marshall Field & Company, Defendant-Appellant. No. 82-1667.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 81 C 5811. Judge Hubert L. Will.

The Court has considered the following documents:

1. The "MOTION TO DISMISS APPEAL" filed on June 3, 1982, by counsel for the plaintiffs-appellees.
2. The "APPELLANT'S STATEMENT AND SUPPORTING MEMORANDUM RE JURISDICTION" filed on June 7, 1982.
3. The "APPELLEES' MEMORANDUM IN RESPONSE TO APPELLANTS' MEMORANDUM ON JURISDICTION" filed on June 8, 1982.

We DENY appellees' Motion to Dismiss and accept jurisdiction over this appeal pursuant to the collateral order doctrine in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

On January 21, 1982, the district court authorized notice of the pending action, and consent forms by which to join the action, to be sent to prospective plaintiffs. Defendant-appellant, Marshall Field & Company, has filed a notice of appeal from the order of the district court denying its motion to strike consents and to dismiss those persons filing consents from this action brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. Appellant is also appealing the denial of its motion for certification of the appeal and its motion for a stay of the proceedings before the district court.

Questions of certification and stay were addressed in the petition for writ of mandamus filed by appellant in Appeal No. 82-1708. The Petition for Writ of Mandamus was denied by this Court on May 27, 1982.

In a recently decided appeal this Court addressed the issue of whether a district judge has the power to notify prospective plaintiffs that an Age Discrimination in Employment action has been brought; and if so, how he should exercise that power. *Woods v. New York Life Insurance Co.*, No. 82-1827 (7th Cir. August 16, 1982). In *Woods* this Court affirmed the district court's power to authorize notice by the plaintiff or his counsel to members of the class; however, the court also held that suitable notice should not appear under a judicial letterhead and should not be signed by a judicial officer.

It appears that the notice and consent forms authorized by the district court to be sent in this case are not in compliance with this Court's holding in *Woods*. For this reason, although we *affirm* that part of the district court's order authorizing that notice be sent, we *reverse* the order insofar as it prescribes an incorrect form of notice, and *remand* to the district court to fashion appropriate relief.*

3. Second Notice and Reaffirmation/Withdrawal Form Sent by Plaintiffs to Respondents After the Court of Appeals Decision

Re: Raymond Allen, Peter Bosman, Carol E. Bunn, and Karl C. Kaiser vs. Marshall Field & Company No. 81 C 5811

*Compare *Partlow v. Jewish Orphans' Home of Southern Cal.*, 645 F.2d 757 (9th Cir. 1981), a suit brought under the Fair Labor Standards Act. In that case the district court order tolled the statute of limitations for filing suit under the FLSA for 45 days to allow potential plaintiffs, whose previously filed consents were ineffective, to file proper consent with the court.

NOTICE OF PENDENCY OF AGE DISCRIMINATION LAWSUIT

TO: All persons who were employed by Marshall Field & Company at any time on or after January 1, 1977 and who are at present over 40 years of age.

RE: Age Discrimination In Employment Act (ADEA) lawsuit against Marshall Field & Company.

The purpose of this Notice is to advise you of an age discrimination lawsuit that has been filed against Marshall Field & Company and to advise you of the legal rights you have in connection with that suit.

1. *Description Of The Litigation.* Four former employees of Marshall Field & Company filed this lawsuit on October 10, 1981. The complaint alleges, in substance, that Marshall Field has engaged in a systematic course of discriminatory conduct against its older employees. This campaign is alleged to have begun in 1977 after Angelo Arena became president of Marshall Field. Plaintiffs allege that this alleged campaign included termination or demotion of older employees for fictitious reasons and forced retirement of substantial numbers of other older employees by placing or threatening to place them in lower-paying or dead-end jobs. Marshall Field & Company has publicly denied all these charges and has denied that it discriminates against anyone on the basis of age.

2. *Your Right To Join This Suit As A Party Plaintiff.* If you believe that Marshall Field has discriminated against you on the basis of age in the manner plaintiffs assert in the complaint, you have the right to assert this claim against Marshall Field as a party plaintiff in the present lawsuit. To do that you must file with the Clerk of the Court a written Notice of Consent to be made a party plaintiff.

It is entirely your own decision whether or not to join this suit. You are not required to join in this case by filing your consent or to take any action unless you want to. It is completely voluntary.

3. *Your Options As To Legal Representation If You Join The Suit.* If you wish to join the suit as a party plaintiff, it is entirely your own decision as to whether you prefer to be represented by the present plaintiffs' attorneys or by an attorney of your own choosing. The attorneys for the present plaintiffs are:

Charles Barnhill, Jr.
George F. Galland, Jr.
Davis, Miner, Barnhill & Galland, P.C.
14 West Erie Street
Chicago, Illinois 60610
(312) 751-1170

If you have any questions with respect to the case, you may contact them.

4. *How To File The Notice Of Consent If You Choose To Join This Suit.* Attached to this Notice is a form to be used if you wish to be a party plaintiff in this suit. That form must be filled out, signed, and mailed to the address below, *postmarked on or before* October 20, 1982. The form should be mailed to the following address:

Mr. Charles Barnhill
P.O. Box 10793
Chicago, Illinois 60610

Unless we receive a Notice of Consent form postmarked on or before October 20, 1982, you may not be allowed to join in this case.

5. *The Legal Effect Of Joining Or Not Joining In This Case.* If you do not file a consent form and join in this case, you will not receive any damages or other relief if the plaintiffs prevail here. Any such relief would be obtainable by you only if you began timely independent legal proceedings as prescribed by the Age Discrimination In Employment Act.

If, however, you decide to join the case by filing your consent, you will be bound by the judgment of the Court on all issues in the case.

6. *No Opinion Expressed As To The Merits Of The Case.* This notice is for the sole purpose of determining the identity of those persons who wish to be involved in this case. Although the Court has authorized the sending of this notice, there is no assurance at this time that the Court will find any plaintiffs' contention meritorious or grant any relief.

7. *Protection Against Retaliation.* The Age Discrimination In Employment Act prohibits anyone from discriminating or retaliating against you if you choose to take part in this case.

/s/ Charles Barnhill
Charles Barnhill

/s/ George F. Galland, Jr.
George F. Galland, Jr.
Attorneys for the Plaintiffs

Re: Raymond Allen, Peter Bosman, Carol E. Bunn, and Karl C. Kaiser vs. Marshall Field & Company No. 81 C 5811

REAFFIRMATION OR WITHDRAWAL FORM

I, _____, hereby:
(Print Name)

Check one box only.

☐ Reaffirm my desire to be a plaintiff in this case.

☐ Withdraw my consent to be a plaintiff in this case.

Signature _____

Send to: Mr. Charles Barnhill
P. O. Box 10793
Chicago, Illinois 60610

4. Explanatory Letter from Plaintiffs' Counsel Which Accompanied the Second Notice

Re: *Allen et al v. Marshall Field & Co.*

Dear Plaintiff:

You joined this lawsuit upon receiving notification of its pendency in a notice signed by the Clerk of the Court. In a recent ruling the Seventh Circuit Court of Appeals expressed its concern that you might have believed that you were being invited by the Court or the Clerk to join this lawsuit. No such invitation was intended.

Neither the Clerk nor the Court have ever taken any position on the issue of whether or not you should participate in this suit. Nor was the notice you received meant to indicate that the Court or the Clerk believed that the lawsuit either has merit or lacks merit. The Court system is completely neutral on whether you should join this lawsuit.

If you were confused by the first notice and believed that you had received a judicial invitation to join this lawsuit or if you now wish to withdraw for any reason, please mark the box indicating the withdrawal of your consent to be a party. If, however, you desire to remain a party to the suit please mark the box reaffirming your desire to be a party. You should respond one way or the other by October 20, 1982. An updated notice of this action previously sent you is enclosed.

Sincerely,

/s/ Charles Barnhill
Charles Barnhill

CB:dm

No. 82-1056

IN THE

Supreme Court of the United States

October Term, 1982

MARSHALL FIELD & COMPANY,

Petitioner,

vs.

RAYMOND ALLEN, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

No. 82-1056

IN THE

Supreme Court of the United States

October Term, 1982

MARSHALL FIELD & COMPANY,

Petitioner,

vs.

RAYMOND ALLEN, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

RESPONDENTS HAVE MISCHARACTERIZED THE ISSUE.

A. The Issue in This Petition Does Not Involve the First Amendment.

The issue in this Petition is whether the District Court had the power to *order* Marshall Field & Company to turn over the names and addresses of hundreds of executives so that a *court-ordered notice* could be sent to these individuals. In an attempt to obfuscate this issue, Respondents argue that the First Amendment prohibits any restraint on the right of plaintiffs to communicate with potential class members. The right of the named plaintiffs under the First Amendment to freely express themselves is not the issue; rather, it is the power of the court to order notice.

B. The Notice in Issue Is the Court-Ordered Notice of January 1982.

Respondents also confuse the issue by arguing that the notice sent by the named plaintiffs in October 1982, and not the court-ordered notice in January 1982, is tested by this Petition. Again, Respondents are incorrect. This Petition questions the validity of the court-ordered notice; the second notice occurred after the decision of the Seventh Circuit and therefore cannot be part of this Petition.

C. A Prohibition Against Court-Ordered Notice Is Not Contrary to *Gulf Oil*.

Respondents contend that a prohibition against communications by plaintiffs is contrary to *Gulf Oil v. Bernard*, 452 U.S. 89 (1981). This contention is irrelevant since *Gulf Oil* did not address the question of the power of a district court under the ADEA to order notice to potential plaintiffs; rather, *Gulf Oil* dealt with the power of a district court, under Rule 23 of the Federal Rules of Civil Procedure, to ban all communication by named plaintiffs with potential class members. This Court held in *Gulf Oil* that a district court has no such power to impose a blanket prohibition on communications, absent a factual showing of the need for such a prohibition. The Court based its holding on Rule 23 and specifically declined to decide whether such a ban also violated the First Amendment rights of the plaintiffs.

The First Amendment is not involved in this Petition. The issue is not the free speech rights of individuals but rather the power of a court to order notice to potential plaintiffs. Contrary to Respondents' contention, the decision of the Ninth Circuit in *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859 (9th Cir. 1977) is not impacted by the *Gulf Oil* holding or reasoning. As noted above, *Gulf Oil* struck down an absolute ban on communications; *Kinney Shoe* invalidated

a court-approved notice to potential plaintiffs as contrary to the congressional intent rejecting notice. *Kinney Shoe* is still good law and is still in conflict with the decision of the Seventh Circuit in this case.

Dated: January 27, 1983.

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER
& HAMPTON,
DAVID A. MADDUX,
DAVID S. BRADSHAW,
R. CRAIG SCOTT,
Attorneys for Petitioner,
Marshall Field & Company.